Supreme Court, U.S.
FILED
OCT 30 2008
OFFICE OF THE CLERK

No. 08- 08-585

IN THE
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DAVID E. WADE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the doctrine of collateral estoppel recognized in *Ashe v. Swenson*, 397 U.S. 436 (1970), bar or limit the trier of fact in a second trial from considering evidence that is relevant to the remaining charges?

2. Does an acquittal on issues of whether a gun was "deadly" or "operable" create a collateral estoppel bar to the consideration of evidence indicating that the defendant wielded the gun, when the gun need not be "deadly" or "operable" to be relevant to the retried counts?

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OPINIONS BELOW

After respondent was convicted in a second trial, the Ohio Court of Appeals, Tenth Appellate District, rendered an opinion and judgment on February 12, 2008, reversing all convictions and remanding for further proceedings. *State v. Wade*, 2008 Ohio 543, 2008 Ohio App. Lexis 459 (2008). The opinion is set forth in Appendix B.

On April 15, 2008, the Tenth District partially granted the prosecution's motion for reconsideration and reinstated most of respondent's convictions but adhered to its decision to reverse and remand the counts of rape and aggravated burglary. *State v. Wade*, 2008 Ohio 1797, 2008 Ohio App. Lexis 1541 (2008). The decision is set forth in Appendix A.

The prosecution's timely appeal of the February 12th opinion was docketed in the Ohio Supreme Court as Case No. 08-604. The prosecution's timely appeal of the April 15th decision was docketed in the Ohio Supreme Court as Case No. 08-941. On August 6, 2008, the Ohio Supreme Court declined discretionary review over both appeals. The entries declining review are set forth in Appendix C and Appendix D.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari was timely filed within ninety days of the Ohio Supreme Court's entries declining discretionary review on August 6, 2008. Section 1257(a) of Title 28 of the United States Code confers jurisdiction on this Court to address whether the Ohio Court of Appeals properly applied federal collateral-estoppel doctrine under *Ashe v. Swenson*, 397 U.S. 436 (1970).

Even though the Ohio Court of Appeals has remanded for further proceedings on the rape and aggravated burglary charges, the judgment of the Ohio Court of Appeals is a "final judgment" within the meaning of Section 1257(a). *Florida v. Meyers*, 466 U.S. 380, 381 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975); *see also*, *Kansas v. Marsh*, 548 U.S. 163, 168 (2006) (citing *Meyers* and cases of "like circumstances" as allowing certiorari review of prosecution petition before retrial).

The prosecution will not be able to obtain review of the federal issue in Ohio courts after a retrial. *State v. D'Ambrosio*, 73 Ohio St.3d 141, 143, 652 N.E.2d 710, 713 (1995) (*res judicata*); *Nolan v. Nolan*, 11 Ohio St.3d 1, 4, 462 N.E.2d 410, 413 (1984) (law-of-the-case doctrine). In addition, if the prosecution wins the retrial, the federal issue will be mooted; if the prosecution loses, the prosecution will be unable to appeal the acquittal. Ohio Revised Code, § 2945.67(A) (prosecutor cannot appeal "final verdict"); *State ex rel. Yates v. Court of Appeals*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987).

CONSTITUTIONAL PROVISIONS INVOLVED

In pertinent part, the Fifth Amendment provides, as follows:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

The Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment, which provides, as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

On August 20, 2002, victim C.B. had returned to her apartment for lunch when respondent Wade knocked on the door. Respondent asked if a particular guy lived there and then asked to use the phone. C.B. unlocked the dead-bolt lock and handed her phone outside. She again locked the door. When respondent said he was done, she unlocked the door. Respondent then pushed his way inside C.B.'s apartment.

Respondent shut the door behind him, pulled a large silver revolver from a backpack, and told C.B. to back up. He said he had been watching her. C.B. began to scream. Holding her at gunpoint, respondent told C.B. to be quiet, and he told her to take off her clothes. After she removed her shirt and pants, respondent told C.B.

to take off her bra and panties. Respondent forced her to lie on the floor, and he forced vaginal intercourse. He held the gun as he completed the act, and said, "shut up, you'll like it."

After the rape, respondent allowed C.B. to put on her shirt. Respondent then asked if she had any money in her purse, and he took a dollar and some change. He then saw her laptop computer and told C.B. to put it in her book bag. She asked to keep her textbooks. Respondent took C.B.'s phone, the cords to the laptop, its charger, her purse and contents, and the key to her car. As he ran out the door, he told her that she had better not leave. Respondent later threw the purse in a dumpster.

A neighbor verified that respondent was outside C.B.'s apartment at about the time of the crime. Later that same night, respondent offered to sell the phone for drugs to another crack user. Respondent then pulled a large silver revolver on him.

On September 2, 2002, respondent was driving C.B.'s car when a police officer attempted to stop him. Respondent fled at a high speed, crashed into another car, and was caught after a foot chase. He initially denied knowing "the girl" or anything about the crime.

The victim C.B., a neighbor, and the crack user picked respondent's picture out of photo arrays. DNA taken from respondent matched that found on the vaginal swab of the victim.

Respondent later testified that the sex was consensual. He admitted stealing C.B.'s car, laptop, and cell phone, when C.B. was in the shower. He acknowledged that this was a "bad decision," given that he was on probation for breaking and entering. He admitted that he sold the cell phone to the crack user but denied robbing him. Respondent admitted that he lied to the police upon arrest and at the police station.

In a nine-count indictment, respondent was charged with aggravated burglary, rape, kidnapping, aggravated robbery, theft (two counts: motor vehicle, and purse and contents, including credit cards), receiving stolen property (motor vehicle), failure to comply with an order or signal of a police officer, and possession of drugs. The first six of these counts included firearm specifications for possessing a "firearm" and brandishing, displaying, or using it.

As the first jury was instructed, an essential element of aggravated robbery was having a "deadly weapon" and brandishing, displaying, or using that weapon. (1st Trial Tr. 540-41) The first jury was instructed (*Id.* 536) that a "deadly weapon" is "any instrument, device, or thing capable of inflicting death and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." Ohio Revised Code § 2923.11(A).

As the first jury was also instructed, an essential element of the firearm specifications was that a "firearm" was involved. (1st Trial Tr. 536-37) A "firearm" is "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive

or combustible propellant." Ohio Revised Code, § 2923.11(B)(1). The jury was instructed that "firearm" includes "an unloaded firearm, and any firearm which is inoperable but which can readily be rendered operable." *Id.*

The first trial jury found respondent guilty of all counts except aggravated robbery. The jury also acquitted respondent of the firearm specifications. The Ohio Court of Appeals later reversed and remanded based on trial error in violating respondent's right to be present when certain jury questions were answered. *State v. Wade*, 2004 Ohio 3974, 2004 Ohio App. Lexis 3593 (2004).

Before the retrial, the defense filed motions based on collateral estoppel to preclude the prosecution from introducing evidence of the gun. The motions were extensively argued. (See 5-8-06 Tr. 4-30) The prosecution's position was cogently summarized in a supplemental memorandum filed on March 27, 2006:

> The State reiterates that the Courts at all levels have rejected Defendant's claim that the acquittal operates to bar the admission of evidence in a subsequent trial. See U.S. Supreme Court decision *Dowling v. U.S.* (1990), 493 U.S. 342, * * *.
>
> The State stresses that in addition to the arguments already made, collateral estoppel simply does not apply. Acquittal on the gun specifications, for example, could reflect nothing more than the jury was unconvinced

> of operability, but operability is entirely unnecessary to prove a rape offense. What matters for rape is the Defendant made the victim believe that he had a weapon, not that the weapon actually worked. * * * These related scenarios are why collateral estoppel requires a careful and searching examination of the first trial, and why the Court in *Dowling*, supra, and subsequent Courts have stressed that the burden is on the Defendant to show that a particular issue has been fully litigated by the first trial. The State submits that the Defendant has not done and can not do that in this case.

The trial court allowed the admission of the gun evidence. (5-8-06 Tr. 28)

On retrial, neither the previously-acquitted aggravated robbery count nor the firearm specifications were submitted to the jury. A part of the aggravated burglary count dependent on the possession of a deadly weapon was not submitted to the jury, and the prosecution proceeded on the theory of aggravated burglary that respondent inflicted or threatened physical harm during the burglary.

Respondent requested a jury instruction that would state "you cannot find he used a deadly weapon to facilitate the rape." (2nd Trial Tr. 658) The request was denied, and the second jury convicted on all of the offenses submitted to it.

Upon further appeal, respondent argued that because the first jury acquitted on the firearm specifications and the aggravated robbery count, collateral estoppel barred any testimony regarding respondent's use or possession of a gun and that, at a minimum, an instruction should have been given preventing the jury from considering whether the gun was used to facilitate the rape. (Defense Brief, First and Second Assignments of Error, at pp. 5-15)

The prosecution filed briefing that opposed those contentions on various grounds. The prosecution argued, inter alia, that operability may have been a possible determinant in the acquittals and that respondent had not met his burden of proving that the issue he sought to foreclose had been decided in his favor. (Prosecution Brief, at p. 12) The prosecution also contended that "testimony relating to prior acquitted conduct does not violate the Double Jeopardy Clause or collateral estoppel principles." (*Id.* at p. 8; *see also*, id. at pp. 7, 8, 15-17, citing and/or quoting *Dowling v. United States*, 493 U.S. 342 (1990))

The Ohio Court of Appeals reversed. *State v. Wade*, 2008 Ohio 543, 2008 Ohio App. Lexis 459 (2008). The court found that collateral estoppel did not bar the testimony in the second trial that the respondent possessed a gun during the offenses of August 20, 2002. *Id.* at ¶¶ 20, 21. Nevertheless, the court went on to hold that the "principle" underlying collateral estoppel required a jury instruction that the gun could form no part of the evidence of force or threat of force needed to accomplish the rape. *Id.* at ¶ 24. The court remanded all the counts for retrial, not just the rape count.

On April 15, 2008, the court partially granted the prosecution's application for reconsideration. *State v. Wade*, 2008 Ohio 1797, 2008 Ohio App. Lexis 1541 (2008). The court agreed that six of the eight convictions were not implicated by the limiting-instruction error. *Id.* at ¶¶ 5-7, 12. However, using a plain-error analysis, the court concluded that the limiting instruction requested for rape also should have been given for aggravated burglary. The court therefore adhered to its decision to reverse and remand the aggravated burglary count as well as the rape count. *Id.* at ¶¶ 8-12.

The prosecution sought discretionary review in two appeals to the Ohio Supreme Court. In the memoranda supporting the appeals, the prosecution's chief proposition of law contended that, "Because collateral estoppel does not limit or preclude the admission of evidence in a subsequent criminal trial, a limiting instruction based thereon should not be given." The prosecution cited statements in various cases from this Court in support of its position, including *Dowling* and *United States v. Felix*, 503 U.S. 378 (1992). *See* Memo Supp. Jurisdiction, No. 08-604, at pp. 6-13; Memo Supp. Jurisdiction, No. 08-941, at pp. 6-15.

The prosecution also contended at pages 12 to 13 of its memoranda:

> To establish the compulsion by force or threat necessary for rape, the State was not required to prove that the weapon was an operable "firearm" or that the weapon was "deadly." It

> was enough that appellee compelled the victim to submit by causing the victim to perceive a danger. The weapon very well could have been a papier mache, non-deadly, and non-operable item, but appellee's actions, including the wielding of the item appearing to be a handgun, were sufficient to show compulsion through force or threat of force.

As the prosecution concluded at pages 13 and 15 of its respective memoranda:

> At bottom, the Tenth District's fundamental error was to misapply the collateral estoppel doctrine to the admission of evidence and to misunderstand the reach of the first jury's earlier acquittals.

On August 6, 2008, the Ohio Supreme Court declined review in both appeals on a 5-2 vote.

ARGUMENT

I. COLLATERAL ESTOPPEL DOES NOT BAR OR LIMIT THE ADMISSION OF EVIDENCE IN A SECOND TRIAL.

II. A CRIMINAL DEFENDANT BEARS THE BURDEN OF PROVING THAT THE ISSUE OF ULTIMATE FACT HE SEEKS TO FORECLOSE WAS ACTUALLY AND NECESSARILY DECIDED IN HIS FAVOR IN THE EARLIER ACQUITTAL.

The issues presented herein warrant certiorari review. In regard to the first question presented, the Ohio court's expansion of collateral estoppel to bar or limit the consideration of evidence conflicts with the logic of this Court's decision in *Dowling* and conflicts with post-*Dowling* case law in some of the federal circuits and some state courts. Since collateral estoppel did not bar the retrial of rape and aggravated burglary, the collateral-estoppel doctrine was thereby exhausted as to those counts, and the Ohio Court of Appeals should not have extended it to limit the consideration of evidence.

The second question presented also warrants certiorari review. The Ohio court's decision conflicts with the proper analysis of collateral estoppel approved by this Court. The Ohio Court of Appeals incorrectly determined that the first jury's acquittal on aggravated robbery and all firearm specifications somehow meant that respondent did not have a weapon at all, when the acquittal meant, at most, that there was a doubt about whether respondent had an "operable" or "deadly" weapon.

The second question presented is also fairly related to the first question. Even if this Court were to conclude that collateral estoppel could warrant a limiting instruction, the particular circumstances of the case would need to be analyzed to determine the proper scope of the limiting instruction. The convictions for rape and aggravated burglary could have been affirmed under harmless-error and/or plain-error review if the limiting-instruction error had only involved the failure to preclude the jury from considering whether an "operable" or "deadly" gun was used to facilitate the crimes. It was no defense to rape and aggravated burglary that respondent may have intimidated the victim with only an inoperable or non-deadly gun.

A.

Collateral estoppel applies to the states as an "ingredient" of double jeopardy analysis pursuant to *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. The collateral estoppel bar will not apply "unless the record establishes that the issue was *actually* and *necessarily* decided *in the defendant's favor*." *Schiro v. Farley*, 510 U.S. 222, 236 (1994) (emphasis added). "[T]he burden [is] on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling*, 493 U.S. at 350.

B.

The Ohio Court of Appeals misapplied collateral-estoppel doctrine to conclude that a "principle" of that doctrine limited the use of evidence in a second trial. Although the appellate court nominally allowed the admission of evidence that defendant had wielded a gun during the rape and aggravated burglary, the appellate court ruled that an earlier acquittal of firearm specifications and of aggravated robbery precluded the prosecution from using the gun evidence to prove that respondent had used force or the threat of force for purposes of rape or to prove that respondent had inflicted or threatened physical harm for purposes of aggravated burglary.

This result conflicts with this Court's statements on the issue of whether collateral estoppel bars the admission of evidence. In *Dowling*, the defendant was tried and acquitted on burglary and attempted robbery. Despite the acquittal, evidence of those crimes was introduced in the trial of a second robbery case. This Court concluded that collateral estoppel did not bar use of the *evidence* of the first robbery in the second robbery case because the first robbery was not an issue that needed to be proven beyond a reasonable doubt in the second trial; the evidence was admissible under the far lower burden of persuasion governing the admissibility of evidence. *Id.* at 348. This Court therefore rejected the defendant's reliance on *Ashe*:

> [W]e decline to extend *Ashe v. Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all

> circumstances * * * relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

493 U.S. at 348. Just two years later, this Court explained *Dowling*:

> Underlying our approval of the [acquitted conduct] evidence in *Dowling* is an endorsement of the basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.

United States v. Felix, 503 U.S. 378, 387 (1992).

Before *Dowling* and *Felix*, lower courts were split on the issue of whether collateral estoppel had an evidence-barring or evidence-limiting effect. This split is summarized in a law review article published in 1989:

> The Court has not, however, recently addressed the use of collateral estoppel on which this article focuses — the use of the doctrine to restrict the prosecution's evidence or theory. The majority of the federal courts and some state courts permit this use.[1] Many

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1. *See, e.g., United States v. Gornto*, 792 F.2d 1028 (11th Cir. 1986); *United States v. Johnson*, 697

(Cont'd)

courts, however, have held that the doctrine is limited to those cases in which an ultimate fact has been resolved in the defendant's favor in a prior proceeding,[2] and the Supreme Court may ultimately agree. In *Yates v. United States*, [354 U.S. 298, 338 (1957)], over a decade before its decision in *Ashe*, the Court stated: "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative." If the Court

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(Cont'd)

F.2d 735 (6th Cir. 1983), *cert. denied sub nom. Hicks v. United States*, 108 S. Ct. 95 (1987); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972); *Riley v. State*, 181 Ga. App. 667, 353 S.E.2d 598 (1987); *see also United States v. Keller*, 624 F.2d 1154 (3d Cir. 1980) (discussing the question and restating that circuit's position that the evidence is barred by non-constitutional doctrine of collateral estoppel which prohibits relitigation of decided facts); * * *.

2. *See, e.g., Flittie v. Solem*, 775 F.2d 933 (8th Cir. 1985), *cert. denied*, 475 U.S. 1025 (1986); *United States v. Sutton*, 732 F.2d 1483 (10th Cir. 1984); *United States v. Van Cleave*, 599 F.2d 954 (10th Cir. 1979); *see also People v. Goodman*, 69 N.Y.2d 32, 36-44, 503 N.E.2d 996, 999-1003, 511 N.Y.S.2d 565, 568-72 (1986) (declining to adopt the "evidentiary fact rule" in that case) * * *.

> limits the doctrine in this manner, the doctrine will never act to bar evidence. * * *

Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. Cin. L. Rev. 1, 8 (1989) (some footnotes omitted; remaining footnotes renumbered and partly quoted in footnotes one and two here).

After *Dowling* and *Felix*, the Fifth Circuit recognized that *Dowling* "calls into question the line of cases holding that collateral estoppel may bar the admission or argumentation of facts necessarily decided in the first trial, even if the subsequent prosecution is not completely barred." *United States v. Brackett*, 113 F.3d 1396, 1401 n. 9 (5th Cir. 1997).

> A general verdict of acquittal "necessarily determines" only that the evidence was insufficient to prove each *element* of the offense beyond a reasonable doubt; therefore, collateral estoppel bars relitigation only of facts that must be proven beyond a reasonable doubt.
>
> Because only ultimate facts must be established beyond a reasonable doubt, however, *Dowling* effectively limits the doctrine of collateral estoppel to cases in which the government seeks to relitigate an essential element of the offense. *See Dowling*, 493 U.S. at 348 (declining to give collateral estoppel effect to a prior acquittal that did not decide an ultimate issue in the second

> prosecution); *see also Ashe*, 397 U.S. at 443 (limiting collateral estoppel to ultimate facts). "*Dowling* teaches that the *Ashe* holding only bars relitigation of a previously rejected factual allegation where that fact is an ultimate issue in the subsequent case." *Wright v. Whitley*, 11 F.3d 542, 546 (5th Cir. 1994); *accord Nichols v. Scott*, 69 F.3d 1255, 1271-72 (5th Cir. 1995), *cert. denied*, 135 L. Ed. 2d 1076, 116 S. Ct. 2559 (1996).
>
> Given the narrow interpretation of collateral estoppel endorsed in *Dowling*, it is difficult to conceive of a case in which collateral estoppel would bar the admission or argumentation of facts necessarily decided in the first trial, without completely barring the subsequent prosecution. In the instant case, however, we have no occasion to consider whether *Dowling* has overruled this line of decisions, and we leave that question for another day.

Brackett, 113 F.3d at 1401 n. 9 (emphasis in *Brackett*).

After *Dowling*, other courts have indicated or held that there is no evidence-barring or evidence-limiting effect. *United States v. Yearwood*, 518 F.3d 220, 228-29 (4th Cir. 2008); *United States v. Bailin*, 977 F.2d 270, 277 n. 9 (7th Cir. 1992) ("We note that *Mespoulede*, insofar as it held that issue preclusion applies to evidentiary as well as ultimate facts, has been partially overruled by *Dowling* * * *."); *Santamaria v. Horsley*, 138 F.3d 1280 (9th Cir. 1998) (use of knife not issue of ultimate fact in

retrial; evidence of stabbing not barred); *United States v. Gil*, 142 F.3d 1398, 1401 (11th Cir. 1998) (if previously-determined fact not ultimate issue in mistried count, prosecution can introduce evidence related to acquitted count in retrial of mistried count); *Halicki v. United States*, 614 A.2d 499, 505 (D.C. App. 1992) (*Dowling* rejected view that evidence relating to acquitted conduct is inadmissible in future trial); *Commonwealth v. Woods*, 414 Mass. 343, 353-54, 607 N.E.2d 1024, 1031-32 (1993) (collateral estoppel "applies to factual issues, not evidence."); *State v. Eggleston*, 164 Wn.2d 61, 71-75, 2008 Wash. Lexis 616 (2008) (issue of defendant's knowledge of victim as police officer was not issue of ultimate fact in subsequent trial; no bar to introduction of evidence of such knowledge); *Eatherton v. State*, 810 P.2d 93, 99 (Wyo. 1991) ("we decline * * * to adopt the evidentiary facts application of the doctrine of collateral estoppel.").

However, some courts deciding the issue after *Dowling* and *Felix* have gone in the opposite direction. *Rossetti v. Curran*, 891 F. Supp. 36 (D. Mass. 1995); *State v. Aparo*, 223 Conn. 384, 409, 614 A.2d 401, 413 (1992) ("evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it 'would establish an element of the charged offense and could therefore form the basis of the conviction * * *.'").

In the present case, the Ohio Court of Appeals incorrectly stated that collateral estoppel can bar or limit the admission of evidence. 2-12-08 Opinion, at ¶ 12. The court also cited the district court decision in *Rossetti*, see 2-12-08 Opinion, at ¶ 24, even though the First

Circuit upon review in *Rossetti* had concluded that the district court's attempted distinction of *Dowling* was "very doubtful." *Rossetti v. Curran*, 80 F.3d 1, 5-6 (1st Cir. 1996).

C.

Ohio submits that, although collateral estoppel may bar successive litigation on counts, or elements of offenses, collateral estoppel has no evidence-barring or evidence-limiting effect. The holding of *Ashe* is that only the relitigation of issues of "ultimate fact" are barred, not issues of evidentiary fact. In light of this Court's earlier statement in *Yates* that collateral-estoppel doctrine usually does not apply to the proof of mere evidentiary facts, *Ashe*'s exclusive focus on "ultimate facts" must be taken as intentional.

This Court has consistently equated "ultimate facts" with verdicts. This Court has observed that:

> It is often necessary for the trier of fact to determine the existence of an element of the crime — that is, an "ultimate" or "elemental" fact — from the existence of one or more "evidentiary" or "basic" facts. *** [I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

County Court v. Allen, 442 U.S. 140, 156 (1979) (constitutionality of mandatory presumptions). The

Court noted the rational connection between basic facts proven at trial and the ultimate fact which an evidentiary presumption permits the jury to find. *Id.* at 165.

The same year, the Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), considered that a part of the responsibility of the trier of fact in reaching a verdict is "to draw reasonable inferences from basic facts to ultimate facts." This Court has equated the factfinder's responsibility to find the "ultimate facts beyond a reasonable doubt" to the right to have the jury (rather than the judge) reach a guilty verdict. *United States v. Gaudin*, 515 U.S. 506, 514-15 (1995) (citations omitted).

D.

Dowling and *Felix* confirm that the introduction of mere evidence does not trigger collateral-estoppel protections. The admission of evidence is governed by a lower standard of proof, *see Dowling*, and the admission of evidence is not the same as a "prosecution" for such evidence. *See Felix.*

The defense counterargument is that collateral estoppel must be applicable to proof of mere evidentiary facts. Otherwise, the second factfinder may find the defendant guilty of an "ultimate fact" beyond a reasonable doubt in the second trial based in whole or in substantial part on evidence of acts for which a reasonable doubt existed for the first jury.

The present case does not involve a scenario in which the prosecution was required to rely exclusively on "gun" evidence in order to have respondent be found guilty of

using or threatening force or of inflicting or threatening physical harm. Respondent's actions of forcing his way into the victim's apartment and his issuance of various commands to the victim (e.g., "shut up, you'll like it") were enough to show that respondent was at least threatening force and physical harm. Respondent could be convicted under Ohio law without any use of a "gun" in his actions/threats toward the victim. Even if the prosecution was relying exclusively on respondent's actions in wielding a "gun," the "gun" fact was still merely evidentiary in the second trial and not an issue that the jury was required to find beyond a reasonable doubt.

E.

Even if collateral estoppel could bar or limit the consideration of mere evidence, respondent failed to show that the first jury decided the issue in such a way that respondent's use of a "gun" should be barred from consideration regarding rape and aggravated burglary. The collateral estoppel bar will not apply "unless the record establishes that the issue was *actually* and *necessarily* decided *in the defendant's favor.*" *Schiro*, 510 U.S. at 236.

The prosecution contended that the first jury's acquittals at most could be understood to mean that there was a reasonable doubt about whether the gun was operable. This made sense, since respondent did not fire the gun, the gun was not produced at trial, and the victim testified in the first trial that she was "not that familiar with guns." (1st Trial Tr. 131) Thus, the first jury could have merely harbored a reasonable doubt about operability.

Equally so, a "deadly weapon" was required for aggravated robbery, and the first jury's acquittal merely could have reflected a doubt about the deadly nature of the weapon. While Ohio law allows a jury to infer that even an inoperable gun is a "deadly weapon," see *State v. Vondenberg*, 61 Ohio St.2d 285, 401 N.E.2d 437 (1980), such an inference would have been permissive. If the first jury harbored a doubt about whether the weapon was "deadly," the jury was required to acquit of aggravated robbery.

The Ohio Court of Appeals dismissed the prosecution's arguments by contending that it must avoid a "hypertechnical and archaic approach" to the issue. But the jury instructions for the first jury defined both "deadly weapon" and "firearm" as essential elements of the aggravated robbery count and/or the firearm specifications. *Ashe* itself mandates that the jury charge must be considered in determining whether "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose." *Ashe*, 397 U.S. at 444. In the absence of evidence that respondent actually fired the weapon or that the weapon was recovered and tested, the first jury rationally could have concluded that the respondent in fact had possessed a gun but that there was a doubt about the "deadly" and "operable" nature of that gun.

As the Ohio Court of Appeals acknowledged, the first jury asked a question about whether a deadly weapon was required to find respondent guilty of aggravated robbery, and the trial court replied in the affirmative. 2-12-08 Opinion, at ¶ 18. But the Court of Appeals then counterintuitively concluded that the

acquittal did not depend on the "deadly" or "operable" nature of the weapon. Given the jury's specific question about "deadly weapon" and the court's affirmative reply, and given the jury instructions, it is hardly "hypertechnical" and "archaic" for the prosecution to contend that the first jury may have merely doubted the "deadly" and "operable" nature of the weapon.

While the operable and deadly nature of the weapon was an issue for aggravated robbery and for the firearm specifications, the operable/deadly nature of the weapon was unimportant to the rape and aggravated burglary charges as submitted to the second jury. The prosecution was not required to prove that the weapon was an operable "firearm" or that the weapon was "deadly" in the second trial. "[T]he State could prove these offenses without proving that appellant used a gun." 2-12-08 Opinion, at ¶ 19. It was enough that respondent threatened the victim by creating a *perceived* danger. Since the "operable" and "deadly" nature of the gun was a mere evidentiary fact in the second trial, the second jury could conclude by a preponderance that the gun in fact was operable and deadly. But, even if the second jury was not inclined to reach that conclusion, the second jury could still consider the "gun" evidence for its effect in intimidating the victim. In either event, the defense was unentitled to a limiting instruction that barred the second jury from considering the "gun" evidence.

The issue becomes a matter of semantics. Respondent's trial counsel requested an instruction that that would have prevented the jury from considering whether the "deadly weapon" was used to facilitate the

rape. But this requested instruction went too far, since such an instruction would have made it appear that the jury could not consider the "gun" evidence at all and since the operable and deadly nature of the "firearm" *could* be considered under the preponderance burden applicable to the consideration of evidentiary facts.

The Ohio Court of Appeals concluded that "the jury in the first trial necessarily found that appellant did not possess a gun during the offenses." 2-12-08 Opinion, at ¶ 25. The court contended that the trial court should have instructed the jury that "it could not consider the gun testimony in determining whether appellant used force while committing the rape offense." *Id.* This broad limitation on the "gun" evidence was improper, as the second jury at the very least could properly consider the "gun" evidence under the theory that respondent intimidated the victim with a non-deadly and inoperable "gun."

CONCLUSION

In light of the foregoing, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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